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No. 86-2012

In the Supreme Court of the United States

OCTOBER TERM, 1987

JON D. COLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Article 3(b) of the Uniform Code of Military Justice, 10 U.S.C. 803(b), which invests military courts with jurisdiction over servicemembers who have fraudulently procured a separation from the military, is within Congress's authority under Art. I, § 8, Cl. 14, to "make Rules for the Government and Regulation of the land and naval Forces."

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-25a) is reported at 24 M.J. 18. Earlier orders of the Court of Military Appeals in this case are reported at 16 M.J. 117 and 16 M.J. 215. The opinion of the Army Court of Military Review (Pet. App. 26a-27a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 20, 1987. The petition for a writ of certiorari was filed on June 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner was tried by a general court-martial at Hunter Army Airfield in Georgia. He was convicted of procuring a fraudulent separation from the United States Army, in violation of Article 83(2) of the Uniform Code of Military

Justice (UCMJ), 10 U.S.C. 883(2). He was sentenced to one year's confinement, total forfeiture of pay, a reduction in rank, and a dishonorable discharge. The convening authority reviewed the case and approved the sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 26a-27a). The Court of Military Appeals affirmed (Pet. App. 1a-25a).

1. A person who has enlisted in the armed forces changes his status from civilian to serviceman by taking the oath of allegiance. *In re Grimley,* 137 U.S. 147, 156-157 (1890); *Wickham* v. *Hall,* 706 F.2d 713, 716 (5th Cir. 1983). Once a person becomes a serviceman, he can honorably terminate his military status only by completing his service obligation and receiving a valid discharge. Exercising its authority to "make Rules for the Government and Regulation of the land and naval Forces" (U.S. Const. Art. I, § 8, Cl. 14), Congress has delegated to the Secretary of each branch of the military the authority to establish procedures by which servicemembers are discharged. See 10 U.S.C. 1168 and 1169. The Secretary of the Army in turn has authorized commanding officers to prescribe the relevant procedures. Army Reg. 635-200, § III, para 1-21*a* (Oct. 1, 1982). This case arises from petitioner's failure to follow the prescribed procedures in obtaining his discharge.

2. Petitioner was a soldier on active duty at Fort Stewart, Georgia, whose obligation to military service was due to expire on August 27, 1982. On August 19, petitioner was informed by his commander that charges had been preferred against him for larceny, housebreaking, and receiving stolen property,[1] and that he would not be

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[1] Petitioner was suspected of breaking into the barracks room of another soldier assigned to his unit and stealing stereo equipment (Tr. 6, 28-29).

released from active duty as scheduled (Tr. 19-20).[2] Petitioner was also told by the first sergeant of his unit that he would not be allowed to leave active duty because of the charges pending against him (Tr. 30-32). In addition, petitioner's Installation Clearance Form (Dep't of Army Form 137) was marked "revoked" by the first sergeant and was subsequently destroyed (Tr. 31, 33).[3] On August 26, however, petitioner obtained a certificate of release from active duty (Dep't of Defense Form 214, Certificate of Release or Discharge From Active Duty) from military authorities at the local Separation Transfer Point by presenting an installation clearance form that contained several forged signatures, including those of his commander and his first sergeant (Tr. 45-55).

3. On November 10, 1982, petitioner was apprehended in Florida.[4] He was subsequently charged and tried for

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[2] Military courts may retain jurisdiction over a servicemember beyond the scheduled expiration of their term of service in order for that servicemember to face charges pending against him. Rules for Courts-Martial 202(c)(1), *Manual for Courts-Martial, United States—1984,* provides:

> Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Once court-martial jurisdiction over a person attaches, such jurisdiction shall continue for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service or other period in which that person was subject to the code or trial by court-martial. When jurisdiction attaches over a servicemember on active duty, that servicemember may be held on active duty over objection pending disposition of any offense for which held and shall remain subject to the code during the entire period.

Petitioner does not challenge the military's authority under Rule 202(c)(1) to retain servicemembers pending court-martial charges on active duty beyond their obligated term of service.

[3] Testimony at trial revealed that it was essential that a servicemember present a completed installation clearance form to obtain a certificate of release from active duty (Tr. 57-71).

[4] Petitioner's first sergeant became aware of the fraudulent discharge approximately four days after its issuance (Tr. 32). Military

fraudulent separation. At trial and on appeal, petitioner unsuccessfully challenged the jurisdiction of the military court to try him. His jurisdictional argument consisted of a challenge to the constitutionality of Article 3(b), UCMJ, 10 U.S.C. 803(b), which grants military courts jurisdiction over servicemen who have obtained a fraudulent separation from the military (Tr. 11-40).

4. The Court of Military Appeals rejected petitioner's claim and found that Article 3(b) was constitutional (Pet. App. 1a-26a). The court concluded that petitioner did not acquire civilian status when he procured his separation by fraud, and that the mere possession of a discharge certificate did not release him from his status as a serviceman (*id.* at 9a).

ARGUMENT

Petitioner contends that the court-martial lacked personal jurisdiction over him because he had procured, albeit fraudulently, a certificate purporting to release him from active duty. He maintains that Article 3(b), UCMJ, 10 U.S.C. 803(b), which grants military courts jurisdiction over a servicemember who has obtained a fraudulent separation from the armed forces,[5] is unconstitutional. That contention does not warrant review by this Court, for several reasons.

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law enforcement personnel began an investigation in early September 1982 (Tr. 85).

[5] Article 3(b) provides:

> Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is * * * subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

First, the question presented in this case has not arisen with the frequency necessary to justify review by this Court. To our knowledge, in the 37 years that Article 3(b) has been in effect the armed forces have brought only three prosecutions for fraudulently obtaining a discharge—this case and the prosecutions at issue in *Wickham* v. *Hall,* 12 M.J. 145 (C.M.A. 1981), and *United States* v. *King,* Misc. Dkt. No. 87-1063 (N.M.C.M.R. May 12, 1987), on reconsideration (July 13, 1987) (No. 87-1063C), petition for review pending, No. 58279 (C.M.A. filed July 9, 1987).[6] Second, there is no conflict among the circuits on the question presented in this case. The Court of Military Appeals' decision in this case upholding the constitutionality of Article 3(b) is consistent with the Fifth Circuit's decision in *Wickham* v. *Hall,* 706 F.2d 713 (1983), which also ruled that Article 3(b) is a valid exercise of Congress's authority to regulate the armed forces. 706 F.2d at 716-718. Finally, the decision below is correct.

The Constitution vests in Congress the authority to regulate "the land and naval Forces" (Art. I, § 8, Cl. 14), which includes the power to establish courts-martial and to define their jurisdiction. *Solorio* v. *United States,* No.

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[6] In *Wickham* v. *Hall,* the accused, prior to her court-martial, petitioned the Court of Military Appeals for a writ of habeas corpus or a writ of prohibition. 10 M.J. 343 (C.M.A. 1981). The court initially stayed the proceedings, 10 M.J. 345 (C.M.A. 1981), but subsequently dissolved the stay and denied the petition for extraordinary relief, 12 M.J. 145 (C.M.A 1981). Wickham then sought a permanent injunction in federal court against further prosecution in a military court. The district court granted summary judgment for the government, and the court of appeals affirmed. 706 F.2d 713 (5th Cir. 1983).

Petitioner chose not to pursue any of these courses of action. As the Court of Military Appeals noted (Pet. App. 10a), petitioner was free to seek habeas corpus relief in federal district court after his arrest to have this claim resolved, but he chose not to do so. See *Schlesinger* v. *Councilman,* 420 U.S. 738, 758-759 (1975).

85-1581 (June 25, 1987), slip op. 3; *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246 (1960). Under that authority, a court-martial may exercise jurisdiction over any crime committed by a servicemember. *Solorio* v. *United States, supra.* To be sure, a court-martial may not exercise jurisdiction over a former serviceman who has validly severed his ties to the military, even for crimes he committed while in the service. *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11 (1955). That principle, however, applies only to persons who are validly separated from military service. The question presented in this case is whether the Constitution permits Congress to assign to the military courts the task of determining whether a serviceman is still in the military or has validly been discharged.

As this Court noted in *Solorio,* "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military" (*Solorio* v. *United States,* slip op. 12). Article 3(b) of the Uniform Code of Military Justice reflects Congress's judgment that a serviceman who has not lawfully received a valid discharge has not completed his military obligation. As the court of appeals unanimously concluded (Pet. App. 6a-9a; *id.* at 17a (Cox, J., concurring); *id* at 22a (Everett, C.J., dissenting)),[7] a serviceman maintains his status as a member of the military until he is validly discharged, and a fraudulently obtained discharge is not a valid separation from the military. *Wickham* v. *Hall,* 706 F.2d at 716-717; *Wickham* v. *Hall,* 12 M.J. at 150 (opinion of Cook, J.); see *United States* v. *Scott,* 11 C.M.A. 646, 648, 29 C.M.R. 462, 464 (1960) (military jurisdiction over a person ter-

[7] Chief Judge Everett dissented from the majority's ruling that a court-martial could make the initial determination whether a person was a serviceman, but he agreed with the majority that a fraudulently-obtained discharge did not prevent the military from reacquiring jurisdiction over a person.

minates "with the delivery to him of a valid discharge certificate"). That line not only is eminently reasonable, but also has been part of military law since at least the Civil War and has been part of the *Manual for Courts-Martial* since 1917. *Wickham* v. *Hall,* 706 F.2d at 716 n.2. None of the cases cited by petitioner are to the contrary.[8]

The armed forces have a compelling interest in prosecuting a former serviceman for fraudulently obtaining a discharge. The military is "a specialized society separate from civilian society" (*Parker* v. *Levy,* 417 U.S. 733, 742 (1974)), and its "primary business" is "to fight or be ready to fight wars should the occasion arise" (*United States ex rel. Toth* v. *Quarles,* 350 U.S. at 17). Article 3(b) of the UCMJ directly promotes that interest. It helps to ensure that a servicemember cannot unilaterally terminate his military obligation and abandon his unit, thereby jeopardizing its mission and perhaps the lives of his fellow servicemembers.[9] In this respect, as the Court of Military Ap-

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[8] The other cases cited by petitioner hold only that court-martial jurisdiction does not extend to civilians and ex-soldiers who have severed all relationships with the military and its institutions. See *Kinsella* v. *United States ex rel. Singleton, supra* (military dependent); *Reid* v. *Covert,* 354 U.S. 1 (1956) (same); *United States ex rel. Toth* v. *Quarles, supra* (lawfully-discharged veteran); *Duncan* v. *Usher,* 23 M.J. 29 (C.M.A. 1986) (court-martial lacked personal jurisdiction to try Air Force reservist who was released from active duty); *United States* v. *Brown,* 12 C.M.A. 693, 31 C.M.R. 279 (1962) (Navy seaman who received valid orders terminating his active duty status is not subject to court-martial jurisdiction). Compare *Kahn* v. *Anderson,* 255 U.S 1 (1921) (dishonorably discharged soldier serving court-martial sentence is subject to court-martial jurisdiction). Because petitioner never received a valid discharge (Pet. App. 11a-12a), these cases are not applicable here.

[9] As the court of appeals explained in *Wickham* v. *Hall,* 706 F.2d at 716: "The enforcement of service obligations is critical for the continued orderly governance of America's land and naval forces. The choice to accomplish that end by authorizing the armed forces to try and punish those who seek to abbreviate their lawful active duty commitments is a constitutionally reasonable exercise of congressional authority."

peals pointed out (Pet. App. 10a, 13a-16a), Congress believed that fraudulently obtaining a discharge was tantamount to desertion, "a crime which strikes at the very core of an armed force" (*id.* at 10a).[10] Because " 'judicial deference * * * is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged' " (*Solorio* v. *United States*, slip op. 12 (citation omitted)), Congress's judgment about the need for court-martial jurisdiction over this type of crime is entitled to respect.

If the military courts may constitutionally try cases involving fraudulent separations, there should be no constitutional objection to permitting the military courts to adjudicate the question whether the separation was fraudulent, *i.e.*, whether the servicemember is still legally in the service or has lawfully been discharged. A servicemember should not be able to oust the military courts of jurisdiction to adjudicate his status by fraudulently obtaining discharge papers any more than he should be able to escape military jurisdiction by asserting that he was never lawfully in the military in the first place. Military courts-martial are the proper forum for resolving allegations of fraudulent separation, because the military regulations and procedures governing the discharge of servicemen from active duty are matters within the special expertise of the military courts. *Wickham* v. *Hall*, 706 F.2d at 717-718; see *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975).[11] If the military courts incorrectly resolve the

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[10] See also *Wickham* v. *Hall*, 706 F.2d at 716 ("Fraudulent separation, like desertion, places the power to thin the ranks of those ready for combat in the hands of the soldier, not the service.").

[11] All prospective witnesses would likely be military personnel. Trial by court-martial where the crime occurred would be an efficient use of resources, particularly where, as here, the defendant was facing a court-martial at the time of his fraudulent separation.

question of a sevicemember's status, he can obtain review of the issue either by seeking a writ of certiorari from this Court or by seeking habeas corpus relief in a federal district court. What the Court of Military Appeals properly held in this case is that a defendant charged with fraudulently obtaining his discharge from the military is not consitutionally entitled to have his military status adjudicated in a district court before the military courts can proceed against him.[12]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[12] Petitioner errs in suggesting (Pet. 6) that Article 3(b) is tantamount to a presumption of guilt. Article 3(b) simply confers jurisdiction on the military courts. The government must prove the defendant's guilt beyond a reasonable doubt at trial, and he is entitled to a presumption of innocence until the facts prove otherwise.

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